



**U.S. Citizenship
and Immigration
Services**

(b)(6)

DATE: **MAR 25 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a researcher and developer of alternative energy and fuels. It seeks to employ the beneficiary permanently in the United States as a project engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, certified by the United States Department of Labor (the DOL). The director determined that the petitioner had failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date. The director denied the petition accordingly.

On appeal, counsel asserts that the petitioner does possess the continuing ability to pay the proffered wage to the beneficiary. Counsel includes copies of previously submitted documentation and the petitioner's financial statement for the four months ending April 30, 2012, in support of the appeal.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (AAO's *de novo* authority is well recognized by the federal courts).

As a threshold issue, and although not noted by the director in the Notice of Decision, the petition cannot be approved because the beneficiary does not satisfy the minimum level of education stated on the labor certification. Specifically, the beneficiary does not possess a baccalaureate degree from an accredited U.S. institution as required on the ETA Form 9089.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Relying in part on *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983), the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984).

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, Question 4, of the labor certification reflects that a bachelor's degree in "Electronics" is the minimum level of education required for the offered job of project engineer. Part H, Question 6, of the labor certification reflects that 60 months of experience in the job offered is also required. The petitioner noted in response to Part H, Question 7 and Question 7-A, that an alternate field of study in "Mechanical Engineering" would be acceptable. The petitioner indicated that an alternate combination of education and work experience was not acceptable in Part H, Question 8. At Part H, Question 9, the petitioner specified that a foreign educational equivalent is not acceptable.

A review of the record reveals that the beneficiary possesses a bachelor of science degree in "Physics" and a master of science degree in "Electronics Science" both from the [REDACTED]. Although the beneficiary possesses an additional certificate from the [REDACTED] as well as an additional certificate from [REDACTED] the record contains no evidence demonstrating that the beneficiary received any degree as a result of his post graduate study.

The beneficiary does not meet the job requirements on the labor certification. Specifically, the beneficiary possesses both a bachelor's degree and master's degree from [REDACTED] but the petitioner indicated on the original ETA Form 9089 that a foreign educational equivalent to the required baccalaureate degree from an accredited U.S. institution was not acceptable for employment in the offered job. For this reason, the petition may not be approved.

The next issue to be examined in these proceedings is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on December 23, 2011. The proffered wage as stated on the ETA Form 9089 is \$109,595.20 per year.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

The record indicates the petitioner is structured as a limited liability company (LLC) and filed its tax returns on the Form 1065, U.S. Return of Partnership Income.¹ The petitioner indicated on the Form I-140 petition at part 5, section 2 that it was established in 2002, employs 5 U.S. workers, and had no gross annual income. According to the Form 1065 tax return in the record, the petitioner's fiscal year corresponds to the calendar year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record contains a copy of a Form W-2, Wage and Tax Statement, reflecting wages paid by the petitioner to beneficiary in 2011, and copies of three checks dated March 5, 2012, March 12, 2012, and March 19, 2012, each in the amount of \$1,150.03, reflecting compensation paid to the beneficiary by the petitioner as follows:

- 2011 – \$65,654.70.
- 2012 – \$3,450.09.

¹ An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

It is noted that the director specifically requested that the petitioner provide a copy of its federal tax return, annual report, or audited financial statement, as well as any Form W-2 statement, Form 1099, Miscellaneous Income, or pay vouchers issued to the beneficiary in a Request for Evidence (RFE) dated April 11, 2012. While the petitioner did provide a copy of the Form W-2 statement issued to the beneficiary in 2011, the three checks dated March 5, 2012, March 12, 2012, and March 19, 2012 are not pay vouchers reflecting the nature of the petitioner's payments to the beneficiary and whether such payments were subject to Social Security and other withholding taxes. The petitioner failed to provide any explanation as to why it did not submit any additional evidence of compensation paid to the beneficiary in January and February of 2012. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Clearly, the petitioner failed to establish that the petitioner paid the beneficiary the full proffered wage of \$109,595.20 in 2011 and 2012. Although the petitioner must demonstrate the ability to pay the full proffered wage in 2011 and 2012, it must be noted that the petitioner is only obligated to show that it can pay the difference between the proffered wage and wages already paid in these years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd* No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of

the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record contains the petitioner's Form 1065 tax return for 2011.² The petitioner's tax return at line 22 stated its net income as <\$165,906.00>.³ Clearly, the petitioner failed to establish that it had the ability to pay the difference between wages paid to the beneficiary, \$65,554.70, and the full proffered wage of \$109,595.20 in 2011 through an examination of its net income for that year.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A partnership's year-end current

² For an LLC filing as a partnership, where an LLC's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where an LLC has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and

assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's Form 1065 return stated its net current assets as \$12,466.00 for 2011. Therefore, the petitioner did not establish that it had sufficient net current assets to pay the difference between the wages actually paid to the beneficiary, \$65,554.70, and the full proffered wage of \$109,595.20 in 2011.

As discussed previously, the director specifically requested that the petitioner provide a copy of its federal tax return, annual report, or audited financial statement in a RFE dated April 11, 2012. However, the petitioner provided an incomplete copy of its 2011 Form 1065 tax return as the return is missing an attached statement, despite the fact that the Form 1065 indicates a statement should be attached. Again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Furthermore, as noted above, the petitioner indicated that it employed five U.S. workers on the Form I-140 petition, but only indicated that it paid \$65,655.00 in salaries and wages (other than to partners and less employment credits) at line 9 of its Form 1065 return for 2011. The fact that the petitioner's Form 1065 tax return for 2011 reflected that all salaries and wages were paid solely to the beneficiary (\$65,654.70 rounded up to the nearest dollar as reflected in the Form W-2 statement for 2011) appears to conflict with the petitioner's claim on the Form I-140 petition that it employed five U.S. employees. This conflict raises questions regarding the credibility of the petitioner's claims on the Form I-140 petition as well as the information contained in the Form 1065 tax return. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

On appeal, counsel submits the petitioner's financial statement for the four months ending April 30, 2012. This statement is prepared by certified public accountant, [REDACTED] in [REDACTED]. Page one of the financial statement contains the specific acknowledgement that, "These financial statements are the responsibility of the Company's management." The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the

salaries). *Id.* at 118.

accountant's reports make clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The record contains the petitioner's monthly statements for a business checking account held at [REDACTED] for December 30, 2011, January 31, 2012, February 29, 2012, and March 30, 2012. Regardless, the petitioner's business checking account represents cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than a readily available asset that could be used to continually pay the proffered wage to the beneficiary since the priority date. In addition, the balance in this account is variable with a balance fluctuating below the proffered wage. Finally, the bank records are incomplete as the statements are missing pages and only cover a four month period from December 2012 through the end of March 2012. Overall, these records do not establish that the petitioner more likely than not had the continuous and sustainable ability to pay the proffered wage since the priority date. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, as explained above, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered when determining the petitioner's net current assets. Therefore, the AAO will not consider the petitioner's bank statements when evaluating the petitioner's continuing ability to pay the proffered wage to the beneficiary.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL on December 23, 2011, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income, or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and

fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this matter, no specific detail or documentation has been provided similar to *Sonegawa*. The instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation, or other circumstances that prevailed in *Sonegawa* are present in this matter. The AAO cannot conclude that the petitioner has established that it had the continuing ability to pay the proffered wage of the beneficiary since the priority date.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.